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Nos. 94-7448, 94-7492

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioners' convictions for using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1).

IN THE SUPREME COURT OF THE UNITED STATES

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No. 94-7448

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-7492

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OPINIONS BELOW

The opinion of the en banc court of appeals (94-7448 Pet. App. 1a-22a) is reported at 36 F.3d 106. The opinion of the panel in 94-7448 (94-7448 Pet. App. 24a-32a) is reported at 995 F.2d 1113. The opinion of the panel in 94-7492 (94-7492 Pet. App. 22a-36a) is reported at 997 F.2d 884. The opinion of the district court in 94-7492 (94-7492 Pet. App. 37a-41a) is reported at 779 F. Supp. 606.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 4, 1994. The petition for a writ of certiorari in No. 94-7448 was filed on December 28, 1994. The petition for a writ of certiorari in No. 94-7492 was filed on December 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner Bailey was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 8412(a); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 51 months' imprisonment on the cocaine possession charge, a concurrent 51 month term on the felon in possession charge, and a consecutive 60-month term on the using or carrying a firearm charge.

Following a jury trial in the United States District Court for the District of Columbia, petitioner Robinson was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); commission of narcotics offenses within 1000 feet of a school, in violation of 21 U.S.C. 860(a); maintenance of a building for the purpose of manufacturing, storing, distributing, or using cocaine base, in violation of 21 U.S.C. 856(a); and using or carrying a firearm during and in relation to a drug trafficking

offense, in violation of 18 U.S.C. 924(c)(1). She was sentenced to concurrent 57 month terms of imprisonment on the narcotics counts and a consecutive 60-month term on the using or carrying a firearm count. 94-7492 Pet. App. 24a.

1. a. In May 1989, petitioner Bailey was stopped by two District of Columbia Metropolitan Police Officers when they noticed that he was driving a vehicle that lacked a license plate and inspection stickers. When Bailey, who failed to produce a driver's license, complied with the officers' instructions to get out of his vehicle, they observed him attempt to conceal an item between the seat and front console. When one of the officers moved the driver's seat back, a white plastic packet of cocaine and a brown leather pouch fell from between the seat and console to the floor of the vehicle. The pouch contained 26 additional packets of cocaine. The officers also discovered a single round of live ammunition. 94-7448 Pet. App. 3a, 25a; Bailey Gov't C.A. Br. 3-4.

After placing Bailey under arrest, the officers conducted a search of the trunk of his vehicle. Among several bags of clothing, they discovered a loaded nine millimeter Smith and Wesson pistol and $3,216 in currency concealed in a vest jacket. 94-7448 Pet. App. 3a; Bailey Gov't. C.A. Br. 3-4.

b. At trial, an experienced narcotics detective testified that the cocaine found in Bailey's car was packaged for sale in $50 bags. He also testified that drug dealers frequently carry weapons "not only to protect themselves but [also] to protect their assets, drugs and money." 94-7448 Pet. App. 26a.

Bailey was subsequently convicted, inter alia, of using or carrying a firearm, in violation of 18 U.S.C. 924(c)(1). That section provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.

c. A divided panel of the court of appeals affirmed, rejecting Bailey's claim that the evidence was insufficient to permit a jury to find that he used a firearm during and in relation to a drug trafficking offense. 94-7448 Pet. App. 24a-32a. The majority concluded that, in order to support such a conviction, all that was required was proof that the firearm facilitated the drug trafficking offense in some way. It reasoned that, even though the pistol was not within Bailey's reach while he was driving his vehicle, a factfinder could reasonably infer that he used the loaded weapon to protect the cash in the trunk and to protect a prior distribution of cocaine. Id. at 29a-30a.

Judge Ginsburg dissented. 94-7448 Pet. App. 30a-32a. He stated that, if prior circuit precedent were not binding, he would "gladly join the majority in upholding the § 924(c) conviction." Id. at 32a. But in his view, prior circuit precedent required reversal of the conviction in Bailey's case. Id. at 30a-31a.

2. a. On July 15, 1991, an undercover District of Columbia police officer approached petitioner Robinson's sister, Veloria,

and stated that he wished to purchase a quantity of crack cocaine. Veloria took the officer to a Northeast Washington apartment and knocked at the door. Robinson responded to the knock and asked the undercover officer what he wanted. The officer said he wanted a "twenty." He then observed Robinson retrieve a rock of crack cocaine from a bedroom, which she sold him for $20 in marked money. The following evening, the undercover officer returned to Robinson's apartment and was sold a quantity of cocaine by Kwarme Parker who stated that he lived in the apartment with her. 94-7492 Pet. App. 23a.

A half hour later, the police executed a search warrant at the apartment. Inside a locked trunk in a bedroom closet, the police found a .22 caliber derringer-type pistol and holster, a tax return signed by Robinson, a letter from Robinson's employer, two rocks of cocaine, the $20 in marked money that the officer had given Robinson on the previous day, and $42.80 in other cash. Other documents in other parts of the bedroom, including a lease, confirmed that Robinson lived in the apartment. As in Bailey, Robinson was charged, inter alia, with using and carrying a firearm -- the .22 caliber derringer -- during and in relation to a drug trafficking offense. 94-7492 Pet. App. 23a.

b. At trial, a narcotics detective testified that the cocaine in the locked trunk had a street value of $700 to $800 in its present form, or a $1400 value if divided into $20 pieces. He also testified that the .22 pistol was commonly known as a "second gun" that a drug dealer would hide on his person for use until he could

reach his "real" gun. He added that guns are generally used by drug dealers to protect themselves from rivals, the police, and employees within the organization. 94-7492 Pet. App. 23a.

Testifying in her own behalf, Robinson acknowledged that she had leased the apartment and owned the trunk in which the narcotics and pistol were found. Although she also admitted that she knew that Parker was selling drugs, she disclaimed knowledge of the drugs or the pistol found in her footlocker. 94-7492 Pet. App. 23a.

The district court denied Robinson's motion for a judgment of acquittal, ruling that the evidence was sufficient to establish that she had used or carried a firearm during and in relation to a drug trafficking offense, in violation of Section 924(c)(1). 94-7492 Pet. App. 37a-41a. The court reasoned that the fact that Robinson's apartment "was a base for the distribution of crack cocaine permits the inference that the gun was used to facilitate the possession with intent to distribute." Id. at 41a. In the district court's view, because "the jury could legitimately infer that [Robinson] had access to the gun in the trunk and could use the gun to protect the stash of drugs and the proceeds of drug sales should the need arise," it did not matter that the trunk was kept locked. Ibid.

c. A divided panel of the court of appeals reversed Robinson's conviction for using and carrying a firearm during and in relation to a drug trafficking offense. 94-7492 Pet. App. 22a-36a. The court determined that Robinson's "possession of this

single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we have held to establish actual use under the statute." Id. at 26a. In the court's view, "mere proximity of a gun to drugs is not * * * sufficient to support a conviction under section 924(c) in this circuit." Id. at 28a.

Judge Henderson dissented. 94-7492 Pet. App. 29a-35a. In her view, the firearm facilitated Robinson's distribution of narcotics, because it protected both her and the drugs during sale transactions. Id. at 33a. In any event, she believed that the jury could reasonably find that the gun concealed in the apartment was used during and in relation to the ongoing offense of maintaining premises for the distribution of drugs. Id. at 34a.

3. a. The court of appeals granted rehearing en banc in both cases and affirmed the convictions under Section 924(c). 94-7448 Pet. App. 22a; 94-7492 Pet. App. 35a. A majority of the en banc court rejected the multi-factor weighing approach previously employed by the circuit for determining the sufficiency of the evidence in support of a Section 924(c)(1) conviction. In the court's view, that test resulted in an impermissible degree of appellate intrusion into the factfinding function of the jury. 94-7448 Pet. App. 6a-7a.

In reformulating the test for sufficiency, the court stated that Section 924(c)(1) requires two showings: that the defendant "use[d]" the firearm and that the use was "during and in relation to a drug trafficking offense." The court first explained the

"use" requirement. It rejected the view that "use" includes only "the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense." 94-7448 Pet. App. 9a. Instead, the court held, "one uses a gun, i.e., avails oneself of a gun, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime." Id. at 10a. Since "possession with the intent to distribute is a continuing offense," the court held that "the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs." Ibid.

Second, the court clarified the requirement that the use of the gun had to be "in relation to a drug trafficking offense." 94-7448 Pet. App. 10a. The court noted that the "in relation to" element requires only the "potential of facilitating" the predicate crime, not the actual furtherance of that crime. Ibid. Therefore, the court concluded, there is sufficient evidence for a jury to infer the "in relation to" element if "at some time during the commission of the predicate drug offense," the defendant "put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (e.g., a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions)." Id. at 11a. In such cases, the court concluded, the "jury may infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of §

924(c)(1)." Ibid.

Applying its standard to the cases before it, the court determined that in each case, the gun was proximate to the drugs or narcotics proceeds and was accessible when the drugs or proceeds were being handled. 94-7448 Pet. App. 12a-13a. The court held that the jury could therefore properly infer in each case that the defendant had placed the gun in that location in order to further the drug offenses or to protect the possession of the drugs, and that the gun had therefore been used "in relation to" a drug trafficking offense. Id. at 12a-13a.

b. Judge Wald filed a dissenting opinion. 94-7448 Pet. App. 13a-15a. In her view, the court's previous multifactor test provided a satisfactory standard for appellate review of Section 924(c)(1) convictions. Id. at 13a. Moreover, she stated, the term "use" requires some type of activity by a defendant "who is in the immediate vicinity of the weapon, and not mere placement of the weapons near the drugs." Id. at 15a. She stated that "[w]here evidence of ready access to a gun by the defendant guarding or distributing the drugs exists," the jury can infer "that such access is an intrinsic part of the criminal drug trafficking act." Ibid. But, under her view, the evidence would be insufficient to sustain conviction for using a firearm where the defendant himself lacks ready access to the firearm. Ibid. Judge Wald concluded that there was sufficient evidence to sustain Bailey's conviction because his gun was accessible to him, but insufficient evidence to sustain Robinson's conviction because "there was proof only of

drugs and an unloaded gun in a locked trunk in a bedroom closet." Ibid.

Judge Williams, joined by Judges Silberman and Buckley, also filed a dissenting opinion. 94-7449 Pet. App. 15a-21a. In his view, the term "uses" connotes "actual service from the weapon in completing an unlawful act," such as by firing it, intimidating opponents, displaying or brandishing it, or using it as an item of exchange. Id. at 17a. Under his view, the term "uses" does not embrace employing the gun to embolden the defendant or to protect his criminal activity; Judge Williams believed "the only function [of a gun employed in those ways] is to make successful completion [of the crime] more probable under contingencies that have not arisen." Ibid. Applying his standard, Judge Williams would have reversed the convictions in both Bailey's case and Robinson's case. Id. at 21a.

Judge Silberman filed a brief dissenting opinion, in which he stated that it was "unfortunate" that the majority of the en banc court had not "confront[ed] fully the analysis set forth in" Judge Williams' dissenting opinion. 94-7448 Pet. App. 21a.

ARGUMENT

1. a. Petitioners contend (94-7448 Pet. 9-16; 94-7492 Pet. 12-13) that the decision of the court of appeals conflicts with decisions of a number of other circuits. To support that claim, petitioners observe (94-7448 Pet. 8, 16; 94-7492 Pet. 12), that, in Langston v. United States, 113 S. Ct. 361 (1992), two Members of this Court dissented from a denial of certiorari because, in their

view, there was a conflict among the circuits concerning the proper test for applying Section 924(c)(1) to drug trafficking offenses. Id. at 362 (White, J., joined by Thomas, J.). The results in different circuits are not in conflict, and any perceived inconsistency in the approach to this issue has abated, due, in part, to the decision of the court below.

This Court explained in Smith v. United States, 113 S. Ct. 2050, 2055 (1993), that the language of Section 924(c) "sweeps broadly, punishing any 'us[e] of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense." As the Court noted, "the word 'use' is 'expansive' and extends even to situations where the gun is not actively employed." Smith, 113 S. Ct. 2054 (citing United States v. Long, 905 F.2d 1572, 1577 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990) (Thomas, J.)). As a result, the regional courts of appeals, including the court of appeals in this case, have agreed that the term "use" embraces not only the active employment of a firearm during a drug transaction, but facilitation of a drug trafficking offense by the placement of a firearm so as to provide protection to the defendant, his narcotics cache, or the proceeds of drug trafficking, should the need arise.[1] Thus, whenever a firearm is placed near the drugs or

[1] See, e.g., United States v. McFadden, 13 F.3d 463, 465 (1st Cir. 1994) (mere presence of arms for the protection of drugs for sale constitutes use); United States v. Paulino, 13 F.3d 20, 26 (1st Cir. 1994) (evidence sufficient to support conviction where "gun was kept in the apartment to be 'available for use' during and in relation to the ongoing drug peddling"); United States v. Fermin, 32 F.3d 674, 678 (2d Cir. 1994) (Section 924(c) conviction will be sustained "if the evidence shows that a defendant strategically placed a weapon so as to enable ready access to it

drug proceeds and the firearm was accessible to the defendant at some time during his commission of the drug offense, a jury may reasonably infer that the firearm was "use[d] * * * in relation to" the offense. The court of appeals correctly noted that its adoption of that standard brought it into accord with the other

during a drug transaction"), cert. denied, No. 94-7407 (Feb. 21, 1995); United States v. Theodoropoulos, 866 F.2d 587, 596-597 (3d Cir. 1989) ("presence in plain view of a loaded firearm * * * is evidence that conspirators may have felt some need for security from which a jury could infer that the weapon was an integral part of [drug trafficking] conspiracy 'used' therein"); United States v. Nelson, 6 F.3d 1049, 1054 (4th Cir. 1993) (firearms in close proximity to cache of narcotics permitted inference "that the firearms were present for protection and to facilitate the likelihood of success of the operation"), cert. denied, 114 S. Ct. 2142 (1994); United States v. Pace, 10 F.3d 1106, 1117 (5th Cir. 1993) ("'Use' does not require * * * discharging or brandishing of the weapon;" government "may meet its burden by simply showing that the weapons facilitated, or could have facilitated, the drug trafficking offense"), cert. denied, 114 S. Ct. 2180 (1994); United States v. Wilson, 27 F.3d 1126, 1133 (6th Cir.) ("within the province of the jury" to conclude that weapon found in hotel room with cocaine "was there to protect the * * * cocaine" and that defendant was therefore guilty of violating Section 924(c)), cert. denied, 115 S. Ct. 452 (1994); United States v. Edwards, 36 F.3d 639, 644 (7th Cir. 1994) ("[e]vidence that a firearm was in proximity and available for protection during the course of a narcotics offense is sufficient" to support conviction on a Section 924(c) count); United States v. Quintanilla, 25 F.3d 694, 700 (8th Cir.) ("To support a conviction under section 924(c)(1), the government need only establish that a firearm was present and available for use."), cert. denied, 115 S. Ct. 457 (1994); United States v. Martinez, 967 F.2d 1343, 1346 (9th Cir. 1992) (Section 924(c) requires neither literal use nor open display; use requirement is satisfied if, due to its proximity to drugs, gun is "available" to defend the cache); United States v. Baker, 30 F.3d 1278, 1279 (10th Cir. 1994) ("We presume a nexus between a firearm and a drug trafficking offense when an individual with ready access to a firearm is involved in such an offense."), cert. denied, 115 S. Ct. 273 (1994); United States v. Poole, 878 F.2d 1389, 1393 (11th Cir. 1989) ("We agree that the presence of weapons in a location defendant used to distribute a significant quantity of illegal drugs is sufficient to submit to the jury the issue of whether defendant used the firearms in connection with a drug trafficking crime.").

circuits. 94-7448 Pet. App. 8a.

It is true that courts of appeals have on occasion reversed convictions under Section 924(c) on the ground that the evidence was insufficient to sustain the jury's verdict. But those decisions invariably rest on the court's conclusion that the government failed to prove proximity and accessibility or that the government failed to prove some other element of its case. They do not conflict with the decision of the court of appeals in this case.

For example, petitioners contend that the decision of the court of appeals conflicts with the decisions of the First and Second Circuits in United States v. Torres-Maldonato, 14 F.3d 95, 101-102 (1st Cir.), cert. denied, 115 S. Ct. 193 (1994), and United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988). See 94-7448 Pet. 10-11. In Torres-Maldonato, however, the First Circuit reversed the defendant's conviction for a violation of Section 924(c) because the government failed to present any evidence linking a particular defendant either to the firearm at issue or to the hotel room in which it was found. The court neither rejected the analysis adopted by the D.C. Circuit in this case nor reached a result that conflicts with the result in this case.[2] To the contrary, the First Circuit has recently reaffirmed its view that

[2] For the same reason, petitioner errs in contending (94-7448 Pet. 13) that there is a conflict with the Tenth Circuit's decision in United States v. Matthews, 942 F.2d 779, 784 (10th Cir. 1991). There, the court reversed the defendant's conviction because there was no evidence that the defendant, a visitor to a residence where a drug transaction was to take place and guns were found, knew of the presence of weapons or handled them.

strategic placement of a firearm for possible employment during a drug transaction is sufficient to sustain a conviction under Section 924(c)(1). See United States v. Fermin, 32 F.3d at 678. See also United States v. Hadfield, 918 F.2d 987, 998 (1st Cir. 1990) (jury may conclude defendant used firearm if it "is found in close proximity to a room or rooms in which drug distribution, processing, or storage occurs"), cert. denied, 500 U.S. 936 (1991).

In Feliz-Cordero, the Second Circuit similarly held that a conviction may be sustained under Section 924(c)(1) if the "circumstances surrounding the possession of a firearm in a place where a drug transaction takes place suggest that it was strategically located so as to be quickly and easily accessible for use during such a transaction." 859 F.2d at 254. The court reversed the defendant's Section 924(c) conviction only because "on the evidence presented there [was] no basis to conclude that the gun would have been quickly accessible" where it was located in the bedroom dresser drawer of an apartment that elsewhere contained drug paraphernalia. That fact-specific conclusion does not conflict with the decision in petitioners' cases.[3] Here, the

[3] Nor does the Second Circuit's recent decision in United States v. Melendez, 1995 WL 29818 (2d Cir. Jan. 26, 1995), conflict with the decision below. In Melendez, a machinegun, some heroin, and a drug record were jettisoned from the window of the defendant's girlfriend's apartment after the police knocked on the door to execute a warrant to arrest him. The court of appeals stated that Section 924(c) is satisfied, "for example, where the proof establishes that the defendant intended to make use of the weapon by having it available for use should it be needed during a drug transaction." 1995 WL at *5. The court held, however, that "[b]ecause the gun was seized in [defendant's] girlfriend's apartment, where no drug transactions were shown to occur, and because the gun was not in a place easily accessible to [the

firearms were placed within easy reach of a cache of narcotics, the apparent proceeds of a drug trafficking operation, or both, and they were therefore were readily accessible for protection of the persons engaged in the drug trafficking offenses.

Nor does the decision below conflict with the holdings of several courts of appeals that the mere presence of a firearm at the time of arrest cannot support an inference that the firearm was used a some earlier time during a predicate drug trafficking offense. See 94-7448 Pet. 11-12. In United States v. Clemis, 11 F.3d 597, 602 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994), for example, the Sixth Circuit reversed a Section 924(c) conviction in a case in which a firearm was discovered at a location where there had been no evidence of drug trafficking for several months and no evidence linked the weapon to any of the defendant's earlier drug transactions. In United States v. Lasanta, 978 F.2d 1300, 1308 (2d Cir. 1992), the evidence showed only that the defendant had possession of a firearm at the time of his arrest following completion of a narcotics-related meeting; the court explained that "[t]here is insufficient evidence to conclude that at the time of [defendant's] arrest, he was involved in specific drug-related activity." The D.C. Circuit did not disagree

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defendant] in the event a contingency arose or for him to make his escape during a drug trafficking offense," the evidence was insufficient to establish a violation of Section 924(c). Ibid. (emphasis added). While the dissenting judge took issue with that conclusion on the particular facts of the case, see id. at *12-*14 (Van Graafeiland, J., dissenting), the Second Circuit's reliance on fact that the gun was not "easily accessible" is consistent with the test adopted by the D.C. Circuit.

with either of those holdings; it merely held that, where the predicate drug trafficking offense is a continuing one, such as possession of narcotics with intent to distribute, evidence that a firearm was positioned to facilitate drug trafficking during the course of the offense is sufficient to support a conviction. See 94-7448 Pet. App. 10a.

Petitioners also claim that decisions of other circuits conflict with the D.C. Circuit's holding that a jury may infer use from accessibility of a firearm during a drug trafficking operation. 94-7448 Pet. 12-13. That claim is mistaken. In United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989), the Third Circuit held that a loaded shotgun located inside an apartment and accessible to drug traffickers operating at that location constituted evidence that the weapon was "used" during and in relation to a drug trafficking conspiracy. Id. at 597. It also held, however, that three other firearms concealed in a trash can on the porch outside the building did not satisfy the requirement of proximity and accessibility. Id. at 597. That holding is consistent with the D.C. Circuit's holding here permitting the jury to infer use where firearms are "accessible from a place that is clearly connected to * * * drug trafficking." 94-7448 Pet. App. 11a.

Similarly, there is no reason to believe that the Tenth Circuit's standard is materially different from that adopted by the D.C. Circuit. In United States v. Conner, 972 F.2d 1172, 1173-1174 (10th Cir. 1992), the Tenth Circuit held that, although "mere

access to a firearm" is insufficient to support a conviction under Section 924(c)(1), the evidence is sufficient where it "prove[s] that the defendant intended the weapon to be available for use during the drug transaction." The court therefore upheld a conviction where the jury could infer from the location of a firearm directly above a commercial quantity of amphetamines that the defendant intended the weapon to be readily available for use during a drug transaction. That holding is consistent with the D.C. Circuit's proximity and accessibility test.

2. Petitioners also claim that the decision of the court of appeals is incorrect. That contention lacks merit.

a. Petitioners first argue that the court's test fails to draw a line between "use" of a firearm, which is prohibited by Section 924(c), and mere "possession," which is not. 94-7448 Pet. 18-26. The court of appeals correctly held, however, that, where the defendant "put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking, (e.g., a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions," the "jury may infer that the gun was being used to protect the drug trafficking operation." 94-7448 Pet. App. 11a. An important use of a firearm is to provide protection to an individual and to embolden that individual to undertake activities that would otherwise be too dangerous. That form of "use" is distinct from the mere possession of a firearm that has no relation to the offense in question. Of course, even when a gun is nearby and

accessible, the jury may refuse to draw the inference that it "was being used to protect the drug trafficking operation." Ibid. The parties may also introduce relevant evidence and present argument on that question. But once proximity and accessibility has been shown, it is for the jury -- not the district court or court of appeals -- to decide whether that inference should be drawn.

b. Petitioners argue that the court of appeals' broad construction of the term "use" renders superfluous Section 924(c)'s prohibition against "carr[ying]" a firearm during and in relation to a crime of violence or drug trafficking crime. 94-7448 Pet. 23-25. As applied to "crimes involving possession of drugs," which are "furtive crimes" in which "[s]tealth is essential," 94-7448 Pet. App. 10a n.1, it may be that a person who "carries" a firearm in relation to the offense (i.e., for his protection) will also be found to have "use[d]" the firearm for that purpose. But the same analysis may not be applicable to all of the predicate "crimes of violence" covered by Section 924(c). See 94-7448 Pet. App. 10a n.1.

In any event, the overlap between "uses" and "carries" is the result of Congress's intent to make sure that both terms were interpreted broadly. As originally enacted in 1968, the statute applied to anyone who "uses a firearm to commit any felony" under federal law and to anyone who "carries a firearm unlawfully during the commission of" any such felony. Pub. L. No. 90-618, § 102, 82 Stat. 1224. Under that formulation, an "unlawful[] carr[ying]" of a firearm "during a felony" could easily be distinct from a "use"

of a firearm "to commit" the felony. In 1984, however, Congress amended the statute to broaden both the "use" and "carries" prongs, omitting the requirement that the firearm be used "to commit any felony" and the requirement that it be carried "unlawfully," while adding the much more general "during and in relation to" element applicable to both prongs. Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139. See S. Rep. No. 225, 98th Cong., 2d Sess. 313-314 & n.10. It is hardly surprising that the result of that change, which plainly expanded the reach of both prongs, was to create a very substantial overlap between "use" and "carry."

c. Finally, petitioners argue (94-7448 Pet. 22-23) that, if Congress had intended the term "uses" in Section 924(c) to embrace the concealment of a firearm in preparation for possible active use in the event of a contingency, it would not, in the adjacent forfeiture provision, have distinguished between firearms "used" and those "intended to be used" in the commission of certain enumerated crimes. That distinction, petitioners contend, demonstrates that, when Congress intended a provision to embrace both "use" and "intent to use," it specifically said so.

The forfeiture provisions of Section 924(d), however, reach both future uses of firearms and intended uses of firearms in future offenses. For example, forfeiture under Section 924(d)(3)(C) applies to the use or intended use of firearms in the offense of shipping a firearm while engaged in the business of unlicensed dealing in firearms. See 18 U.S.C. 922(a)(1). A firearm shipped in the course of such a business would be "used" in

the commission of such an offense, whereas a firearm in the dealer's inventory awaiting shipment would be one "intended to be used" in the commission of a future crime. See United States v. One Assortment of Seven Firearms, 632 F.2d 1276, 1278-1279 (5th Cir. 1980). The terms "used" and "intended to be used" thus apply to different firearms, and Congress therefore had reason to employ both terms in defining the class of property subject to forfeiture. In contrast, Section 924(c) requires actual (not future) commission of the predicate crime and actual (not future) use.[4] The language of Section 924(d) therefore provides no reason for rejecting the D.C. Circuit's interpretation of Section 924(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995

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[4] For example, if a drug dealer purchased a firearm for the purpose of protecting his drug operations, but was presently storing the firearm at a remote and inaccessible location, that firearm would be subject to forfeiture under Section 924(d), although it would not be the basis for a prosecution under Section 924(c).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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RONALD J. BAILEY, PETITIONER	)	
	)	
v.	)	NO. 94-7448
	)	
UNITED STATES OF AMERICA	)	
CANDISHA S. ROBINSON, PETITIONER	)	
	)	
v.	)	NO. 94-7492
	)	
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first-class mail, postage prepaid, this 6th day of March 1995.

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Solicitor General

March 6, 1995